

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
DEBRA JEAN McDOWELL,) CASE NO. 03-30871 HCD
) CHAPTER 13
)
DEBTOR.)

Appearances:

Mary L. Kohn, Esq., attorney for debtor, 52303 Emmons Road, A-15, South Bend, Indiana 46637;

David G. Thomas, Esq., attorney for KeyBank National Association, Sanders Pianowski, LLP, 300 Riverwalk Drive, Elkhart, Indiana 46516;

John W. Van Laere, Esq., attorney for Teachers Credit Union, Jones Obenchain, LLP, 600 KeyBank Building, 202 South Michigan Street, Post Office Box 4577, South Bend, Indiana 46634-4577; and

Debra L. Miller, Esq., Standing Chapter 13 Trustee, Post Office Box 4369, South Bend, Indiana 46634-4369.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 5, 2003.

Before the court is the Motion to Dismiss filed by KeyBank National Association (“KeyBank” or “Bank”), a secured creditor of the debtor, on March 20, 2003. One week later, another secured creditor, Teachers Credit Union (“TCU”), filed its Response In Favor of Motion to Dismiss Filed by KeyBank, supporting KeyBank’s motion and asking that the dismissal be with prejudice. The debtor, by counsel, filed an Objection to Motion to Dismiss on April 9, 2003. The court held a hearing on the matter on May 22, 2003, and took the matter under advisement on May 27, 2003. For the reasons that now follow, the court grants the Bank’s Motion to Dismiss and dismisses this case with prejudice.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and

determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor filed her present voluntary chapter 13 petition on February 24, 2003. On March 20, 2003, the Bank filed its Motion to Dismiss, and TCU joined in support of the Bank's motion.¹ The debtor responded, objecting to the motion. At the hearing on the Bank's motion and the debtor's objection were the attorneys for KeyBank and TCU, debtor's counsel and the chapter 13 Trustee. After each party presented a statement concerning the present status of the case and reasons for and against dismissal, the discussion focused on whether dismissal should be with or without prejudice. The court found that dismissal of the case was warranted and took under advisement the question whether it should be with or without prejudice.

The facts in this case are undisputed. On November 9, 1994, the Bank and the McDowells, Debra Jean McDowell and her husband Robert A. McDowell, executed a mortgage and security agreement. Upon their default, the Bank obtained a summary judgment, default judgment and decree of foreclosure against the debtor and her husband. That judgment, in the amount of \$105,282.51, ordered on February 12, 2001, in Elkhart Superior Court, granted the Bank a foreclosure against their real estate in Elkhart.²

¹ On March 19, 2003, the Trustee filed a Motion to Dismiss this case for failure to file a plan. However, the debtor filed her plan on March 24, 2003, and the Trustee withdrew her motion to dismiss. The Trustee filed another Motion to Dismiss on May 21, 2003, and an Amended Motion to Dismiss on May 23, 2003, on the ground that the debtor's automatic withdrawal payment plan was not working and that she had failed to keep current with her plan payments. Hearing on the Trustee's Motion is set for October 16, 2003.

² The judgment, as of the date of the debtor's bankruptcy petition, was in the amount of
(continued...)

A sheriff's sale of that real estate was scheduled for July 3, 2001. The debtor and her husband filed a voluntary chapter 13 petition on July 2, 2001 (Case No. 01-33310), and the sale was stayed. On November 15, 2001, the Court granted TCU's motion for relief from stay and abandonment of the real estate. However, on November 29, 2001, the Court granted debtor Debra Jean McDowell's motion to convert her case voluntarily from a chapter 13 to a chapter 7 (Case No. 01-35985), and her case was bifurcated from her husband's. Then, on December 19, 2001, the court dismissed Robert A. McDowell's chapter 13 case without prejudice for excessive indebtedness to the Internal Revenue Service. Debra Jean McDowell was discharged and her case closed on May 16, 2002. The original chapter 13 case, now Robert's alone, was closed on May 31, 2002.

A sheriff's sale of that real estate again was scheduled, to be held August 27, 2002 (after the Bank had obtained an order authorizing abandonment and granting relief from the automatic stay in case 01-33310). However, the debtor filed another chapter 13 case on August 26, 2002 (Case No. 02-34832), one day before the sheriff's sale, and the sale was stayed. The debtor sought to dismiss her case two months later, without ever filing a chapter 13 plan, and the court so ordered on October 28, 2002.

A sheriff's sale of that real estate again was scheduled, to be held February 25, 2003. As before, the debtor filed a chapter 13 petition on February 24, 2003 (Case No. 03-30871), the present case before this court.

Positions of the Parties

The Bank asserted that the debtor filed a petition in bankruptcy the day before each of three scheduled sheriff's sales solely for the purpose of staying the sale. It pointed out that the debtor has made no payments to the Bank on this property since June 4, 2000, that the prepetition arrearage is in the amount of \$19,887.87, and that there is little or no equity in the real estate. It noted the significant expense it has incurred

²(...continued)

\$123,059.92. That same summary judgment ruling by the Elkhart Superior Court also granted TCU a judgment against the debtor and her husband in the amount of \$104,455.99. TCU, like the Bank, held an obligation secured by a mortgage on that real estate.

in time and attorney fees. The Bank requested a dismissal of the debtor's bankruptcy, on the ground of bad faith, and sought fees and costs.

The Bank based its motion for dismissal of the debtor's chapter 13 case on 11 U.S.C. § 1307(c), which allows dismissal "for cause." It urged the court to review the totality of the circumstances and to find that the cause for dismissal should be the debtor's lack of good faith. Relying on *In re Herrera*, 194 B.R. 178, 187-88 (Bankr. N.D. Ill. 1996), it argued that a case filed only for the purpose of forestalling a foreclosure action, without the intention of financial rehabilitation, should be dismissed as having been filed in bad faith. It pointed out that the debtor filed three bankruptcy cases in less than 15 months and had filed one earlier with her husband. It noted that the last payment to the Bank was made on June 4, 2000, and that it was the debtor's custom not to file a plan of reorganization. These actions constituted bad faith filings, asserted the Bank. Moreover, it claimed, the debtor has no ability presently to pay her monthly mortgage payments or to cure the prepetition arrearage. It asked that the court dismiss the case with prejudice, pursuant to 11 U.S.C. § 349(a) and § 105(a). TCU supported the Bank's motion to dismiss and urged that dismissal be with prejudice.

The debtor objected to the Bank's motion, contesting that her financial situation was better now than it was in 2002. In her Objection, she noted that a wage deduction order was filed on March 27, 2003, and asserted that she now was able to pay her debts. She insisted that her plan, filed March 24, 2003, was proposed in good faith. At the hearing, debtor's counsel told the court that the working wage deduction was functioning but that it did not cover the mortgage payments. She stated that the debtor intended to make an additional payment toward the mortgage at the end of the month. However, the Trustee notified the court that, on the day before the hearing, she had filed a Motion to Dismiss, basing dismissal on the grounds that the debtor's automatic payment withdrawal plan was not working and that the debtor was delinquent in her payments.

Discussion

A. *Dismissal For Cause*

KeyBank has requested dismissal of this debtor's chapter 13 case pursuant to 11 U.S.C. § 1307(c), which provides:

[O]n request of a party in interest . . . and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause.

This provision of the Bankruptcy Code provides a nonexhaustive list of examples of "cause," including the debtor's unreasonable delay, the failure to file a plan timely, and the failure to commence making timely payments within thirty days after the plan is filed, as § 1326 requires. The Bank does not rely on any of the ten specific examples of cause listed in § 1307(c). Rather, the Bank asserts that the chapter 13 petition was not filed in good faith and that the debtor was abusing the bankruptcy law. This circuit has upheld the power of the bankruptcy court to dismiss a chapter 13 petition upon a finding, under § 1307(c), that the debtor did not bring it in good faith, even though the provision does not list "bad faith" as a specific "cause" for dismissal. *See In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). *Accord, Alt v. United States (In re Alt)*, 305 F.3d 413, 418 (6th Cir. 2002); *In re Banks*, 267 F.3d 875, 876 (8th Cir.2001); *In re Lilley*, 91 F.3d 491, 496 (3d Cir.1996); *Eisen v. Curry (In re Eisen)*, 14 F.3d 469 (9th Cir.1994); *Gier v. Farmers State Bank of Lucas (In re Gier)*, 986 F.2d 1326, 1329 (10th Cir.1993).

The Bank, as the party moving for dismissal, has the burden of proving cause by showing a lack of good faith in filing the bankruptcy petition. *See In re Love*, 957 F.2d at 1355. Whether a debtor filed the chapter 13 petition in good faith is "a fact intensive inquiry to be determined by looking at the totality of circumstances." *Id.* The court focuses on "whether the filing is fundamentally fair to creditors and, more generally, . . . fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." *Id.* at 1357. The Seventh Circuit enumerated an open-ended list of factors that are relevant when determining if a chapter 13 petition was filed in good faith:

the nature of the debt, including the question of whether the debt would be nondischargeable in a chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

Id. at 1357 (citing cases). In *Love*, the appellate court affirmed the district court's upholding of this bankruptcy court's dismissal of the debtor's chapter 13 petition for lack of good faith. It agreed that the debtor had filed his petition to avoid his debt to the IRS; to thwart the payment of an otherwise nondischargeable income tax debt; and to use the bankruptcy provisions for an improper and fundamentally unfair purpose. This court is mindful of the appellate court's admonition that, "[b]ecause dismissal is harsh we agree that the bankruptcy court should be more reluctant to dismiss a petition under Section 1307(c) for lack of good faith than to reject a plan for lack of good faith under Section 1325(a)." *Id.* at 1356.

In this case, the Bank points out that the debtor is a serial filer, having filed four bankruptcies, three of which were filed within a fifteen-month period. It claims that there was no plan proposed in the first two chapter 13 cases and that no plan had been filed in this case as of the time the Bank filed its Motion to Dismiss.³ Each of these cases had been filed one day before a sheriff's sale, and each time the sale was stayed. However, the debtor has made no payments to KeyBank since June 4, 2000 – no payments during any of her bankruptcies or between her bankruptcies – and her prepetition arrearage is in the amount of almost \$20,000. According to the Bank, the debtor clearly is not able to make her mortgage payments or to cure the arrearage.

The court finds that the Bank properly obtained court orders approving its foreclosure action, first in Elkhart Superior Court and then twice in this court. On the eve of each of the Bank's three scheduled sheriff's sales, this debtor (once with her husband) filed a bankruptcy petition, thereby thwarting the sale of the real estate. The court finds, therefore, that the debtor's repeated filings of bankruptcy petitions to stop foreclosure

³ The court finds that a plan was submitted in the first chapter 13 bankruptcy, 01-33310, filed by Mr and Mrs. McDowell jointly; however, it was untimely filed, more than two months after the petition, and was never confirmed. Debra Jean McDowell did not submit a plan in case 02-34832 before filing her motion to dismiss her case. She belatedly filed a plan in the present case, 03-30871, and it has not been confirmed.

proceedings intentionally abused the protection granted to debtors under the Bankruptcy Code in order to frustrate her creditors. As then-Chief Judge Lindquist concluded, based on a similar set of facts, “it is clear that when a bankruptcy case has been filed only for the purpose of inhibiting or forestalling a foreclosure action on the debtor’s assets without the intention of financial rehabilitation, the case should be dismissed as having been filed in bad faith.” *In re Earl*, 140 B.R. 728, 739 (Bankr. N.D. Ind. 1992) (dismissing the case for cause). *See also, e.g., In re Penny*, 243 B.R. 720, 729 (Bankr. W.D. Ark. 2000) (finding that debtor’s penchant for repeatedly filing bankruptcies on the eve of foreclosures was evidence of bad faith); *In re Falotico*, 231 B.R. 35, 41 (Bankr. D. N.J. 1999) (finding that debtor’s history of multiple bankruptcy filings and dismissals was probative of bad faith); *In re Ferrell*, 227 B.R. 706, 709-10 (Bankr. S.D. Ind. 1998) (lack of good faith is sufficient cause under § 1307(c)); *In re Bucco*, 205 B.R. 323, 324 (Bankr. W.D. Fla. 1996) (finding that serial filings with the purpose of forestalling a foreclosure action, were bad faith filings warranting dismissal for cause); *In re Spear*, 203 B.R. 349, 353 (Bankr. D. Mass. 1996) (same); *In re Herrera*, 194 B.R. at 187-88 (same).

This court finds that the debtor’s pattern of conduct – her repeated filings of bankruptcy petitions on the day before each sheriff’s sale and her failed or belated filing of a chapter 13 plan in each case – when reviewed in the totality of the circumstances reflects a clear lack of good faith. In the view of this court, the debtor’s sole purpose in filing serial petitions was to obtain the favorable treatment afforded by the automatic stay provision of the Bankruptcy Code. *See Walker v. Stanley*, 231 B.R. 343, 349 (N.D. Cal. 1999) (listing factors for evaluating debtor’s history). As a result, her creditors have not been paid and have been kept “at bay” for more than three years. *See In re Penny*, 243 B.R. at 729 (dismissing with prejudice after finding that debtor kept creditors at bay for more than one year). The court determines that the debtor has abused the bankruptcy system. *See In re Alt*, 305 F.3d at 419 (“The key inquiry [for § 1307(c) dismissal] is whether the debtor is seeking to abuse the bankruptcy process.”) It therefore dismisses this chapter 13 case for cause, pursuant to 11 U.S.C. § 1307(c), as being filed in bad faith.

B. *Dismissal With or Without Prejudice*

Having found cause to dismiss this case pursuant to § 1307(c), the court now considers whether the dismissal should be with or without prejudice. Section 349, which concerns the effect of a dismissal of a case, provides that dismissal ordinarily is “without prejudice” to the refiling of a case unless the court finds “cause” for ordering a dismissal “with prejudice”:

§ 349(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C. § 349(a). According to that section, debts existing at dismissal remain dischargeable in a subsequent bankruptcy case unless the court, “for cause, orders otherwise.”

Section 109, to which § 349(a) refers, defines who may be a debtor:

(g) . . . [N]o individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if —

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case

11 U.S.C. § 109(g). Section 109(g) prohibits a debtor from refiling her case for 180 days if she did not follow the court’s orders or did not appear to prosecute her case. The purpose of the absolute bar on filing “was to provide the bankruptcy courts with greater authority to control abusive multiple filings.” *In re Penny*, 243 B.R. at 728 (citing the legislative history and cases). Indeed, the provision was added to address “the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code’s automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest.” *Colonial Auto Center v. Tomlin (In re Tomlin)*, 105 F.3d 933, 937 (4th Cir. 1997). Courts have found that a debtor’s “willful failure . . . to appear before the court in proper prosecution of the case” includes such dilatory conduct as the failure to pay under the plan, to appear at § 341 meetings, to produce financial information, or to demonstrate a change in circumstances from prior cases before refiling. See *In re Herrera*, 194 B.R. at 186-90 (finding that a pattern of repeated failures by debtor constituted willful conduct and a failure to appear in proper prosecution; dismissing

serial case); *In re King*, 126 B.R. 777, 781 (Bankr. N.D. Ill. 1991) (finding debtor's deliberate failure to perform duties constituted a failure to prosecute the case).

The court finds that this debtor knowingly and intentionally failed to perform her duties under the present Chapter 13 case by failing to file a plan timely, failing to commence making timely payments, and failing to state on her bankruptcy petition that she had two other prior bankruptcies. The court notes that the debtor belatedly filed a plan and amended her petition to reflect the omitted bankruptcies. Nevertheless, these examples of debtor-created unreasonable delays in the bankruptcy process caused continuing delay and prejudice to the creditors. *See In re McClure*, 69 B.R. 282, 287 (Bankr. N.D. Ind. 1987) (noting the debtor's "consistent 'foot-dragging' regarding compliance with Court orders). Moreover, the court finds that, in the second chapter 13, no plan was filed or confirmed and the debtor never attended the § 341 meeting, which was set three times. In the first chapter 13, the plan was belatedly filed and never confirmed. *See id.* at 289 (concluding that such failures constitute a failure of the debtor to prosecute its case). In addition, even though the debtor received notice and the opportunity to oppose dismissal with prejudice, she never claimed that there had been a material change in her circumstances that might justify the filing of three bankruptcies in fifteen months and each bankruptcy case the day before a sheriff's sale. *See Litton v. Wachovia Bank*, 330 F.3d 636, 645-46 (4th Cir. 2003) (stating that changed circumstance is a good-faith factor in assessing a petition or plan). The debts at issue in this case were incurred long ago and have continued to grow. The court finds that the instant case was filed solely to forestall the foreclosure action by the Bank after it won a state court judgment against the debtor. The court finds that the debtor's conduct was egregious and that her serial filings reflect her willful abuse of the bankruptcy process and constitute cause that is sufficient to warrant a dismissal of her case with prejudice under § 109(g)(1).

Section 349(a) has a different purpose: It bars further bankruptcy proceedings between the parties and prevents the debtor from later obtaining a discharge of any of the debts that exist at the time of the dismissal. It is used sparingly, only when the debtor's conduct is egregious and only after full opportunity for a hearing. *See Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223-34 (9th Cir. 1999); *In re Tomlin*, 105 F.3d at 936-37

“Generally, only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors — for example, concealing information from the court, violating injunctions, or filing unauthorized petitions — will a bankruptcy court forever bar the debtor from seeking to discharge then existing debts.”). A bankruptcy court may rely on § 349(a) to prohibit the filing of a bankruptcy case beyond the 180-day limit established in § 109(g). *See Casse v. KeyBank National Ass’n*, 198 F.3d 327, 337 (2d Cir. 1999) (noting that § 349(a) and § 105 provide “the power to sanction bad-faith serial filers . . . by prohibiting further bankruptcy filings for longer periods of time than the 180 days specified by § 109(g)”); *In re LeGree*, 285 B.R. 615, 621 (Bankr. E.D. Pa. 2002) (same).

In this case, the court finds that its power under § 109(g)(1) to prohibit this serial filing debtor from filing a petition for 180 days is a sufficient limitation. That time period should allow the Bank to proceed with its long-delayed foreclosure action. The court therefore determines that this debtor’s chapter 13 petition was filed in bad faith, that this case should be dismissed for cause pursuant to 11 U.S.C. § 1307(c), and that the debtor is prohibited from filing further bankruptcy petitions for 180 days pursuant to 11 U.S.C. § 109(g)(1).

Conclusion

For the foregoing reasons, the court grants the motion of KeyBank and dismisses this chapter 13 case pursuant to 11 U.S.C. § 1307(c). The court finds that the debtor’s chapter 13 petition in this case was filed in bad faith and that her serial bankruptcy filings and dismissals were sufficient evidence of bad faith to warrant depriving the debtor of the right to relief under the Bankruptcy Code for 180 days from the date of this Order. The instant case therefore is dismissed with prejudice pursuant to 11 U.S.C. § 109(g)(1). It is ordered that the debtor shall be precluded from filing another bankruptcy petition in any chapter of Title 11 of the United States Code for a period of 180 days commencing on the date of this Order.

SO ORDERED.

Handwritten signature of Harry C. Dees, Jr. in black ink, with the initials JSOI written in the bottom right corner of the signature.

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT